

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION) STIPULATION FOR CONTESTED
FOR BENEFICIAL WATER USE PERMIT) WATER RIGHT APPLICATION
NO. 14,991-s76LJ BY DAVID MITTON)

Pursuant to Notice, a Hearing was conducted June 1, 1979, at Kalispell, Montana. The Applicant, Mr. David Mitton, appeared on his own behalf and was not represented by counsel. Objectors present were: Mr. F. Allan Sheldon and his wife Janet I. Sheldon, also present was Dr. and Mrs. John Lipinski. The Objector, Mr. William J. Kesler, was not present, but was represented by Counsel, James E. Vidal. Department personnel present were: Ms. Rita Nason, Hearings Recorder; Mr. Arlin Krogstad, Technical Representative; Mr. James Rehbein, Kalispell Area Office Manager. Forrest Tevebaugh, Department Hearing Examiner, presided.

During the course of the hearing, proposed conditions for a stipulation were offered by counsel for the Objector, William J. Kesler. Specifically, Counsel James E. Vidal, requested that conditions of a similiar nature as imposed in the granting in the Permit No. 8982-s76LJ by Victor A. Sistok, dated September 23, 1977, be imposed.

In particular, Mr. Vidal requested that paragraphs 7 and 10 of the Proposed Findings of Fact, paragraphs 4, 5, 6 and 7 of the Proposed Conclusions of Law, and paragraphs 2, 3, 4, 10 and 11 of the Proposed Order be reflected as well in the granting of this application should the stipulation be favorably received. Reading directly from the Victor A. Sistok Proposed Order under Proposed Findings of Fact, paragraph 7, "For purposes herein, based upon testimony given at the hearing, it is specifically found that the Objector, William J. Kesler, is entitled to

1 a prior water right to 300 miner's inches of water from Patrick Creek
2 with a priority date of August 2, 1888, used for irrigation from April 1
3 to November 1, inclusive, of each year." Paragraph 10, "For purposes
4 herein, based upon testimony given at the hearing, it is found that the
5 proposed use will not interfere unreasonably with other planned uses or
6 developments for which a permit has been issued, or for which water has
7 been reserved." In the Proposed Conclusions of Law for the Sistok
8 Order, paragraph 4, "Pursuant to 89-886 (1), R.C.M. 1947, valid rights
9 of prior appropriators must be protected in the issuance of a Beneficial
10 Water Use Provisional Permit. It is concluded that the rights of prior
11 appropriators will be protected if the permit is conditioned so as to
12 protect those rights." Paragraph 5, "Specifically, it is concluded that
13 the Patrick Creek water right of the Objector, William J. Kesler, as
14 delineated in the Proposed Findings of Fact, paragraph 7, above, must be
15 protected and made senior to any right accorded by any Provisional
16 Permit granted herein." Paragraph 6, "It is concluded that the issuing
17 of a Provisional Permit in no way reduces the Applicant's liability for
18 any damage caused by the Applicant's exercise of his Provisional Permit."
19 Paragraph 7, "It is concluded that nothing decided herein has bearing
20 upon the status of water rights claimed by the Applicant other than
21 those herein newly applied for, nor does anything decided herein have
22 bearing upon the status of claimed rights of any other party except in
23 relation to those rights herein newly applied for, to the extent necessary
24 to reach a conclusion herein." The Sistok Proposed Order, paragraph 2,
25 "The Provisional Permit is granted subject and junior to all valid prior
26 existing water rights in the source of supply, including but not necessarily
27 limited to the 300 miner's inch water right of the Objector, William J.
28 Kesler, as said right is delineated at Proposed Findings of Fact,
paragraph 7 and Proposed Conclusions of Law, paragraph 5, above.

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Paragraph 3, "The Applicant may not appropriate water for either consumptive or nonconsumptive use at such times when to so appropriate would adversely affect any prior existing water right in the source of supply." Paragraph 4, "Specifically, the Applicant shall not divert water in any manner from Patrick Creek pursuant to this Provisional Permit and any time when the Objector, William J. Kesler, does not have a full 300 miner's inches available for appropriation at the Objector's point of diversion on Patrick Creek." Paragraph 10, "The granting of a Provisional Permit in no way grants the Applicant any right to violate the property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit." Paragraph 11, "The granting of a Provisional Permit in no way guarantees that the Applicant will be able to exercise the Provisional Permit."

The Applicant, Mr. David Mitton, after some discussion, agreed to the above mentioned stipulation. The other Objectors, Mr. and Mrs. Sheldon, and Dr. and Mrs. Lipinski also agreed that if some provisions were incorporated into any permit that would be issued that would guarantee that the prior right that they possessed, they would agree to withdraw their objection to this application. The stipulation as proposed, was accepted by the Hearing Examiner with the understanding that certain standard conditons that the Department imposes on all permits, would necessarily become part of any Final Order concerning this application. And further, that it would be necessary to modify the language from the Sistok Application No. 8982-s76LJ to more accurately reflect the conditions of the permit to be granted.

1 THEREFORE, IT IS ORDERED, that the Department shall issue Proy-
2 isional Permit No. 14,991-s76LJ to David Mitton to appropriate 55
3 gallons per minute of water not to exceed .61 acre-feet per annum from
4 Patrick Creek, a tributary of Ashley Creek, in Flathead County, Montana.
5 The water is to be diverted by means of a pump from Patrick Creek at a
6 point in W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, Township 27 North, Range 21 West,
7 MPM, and used for wildlife, fire protection, and stock watering purposes
8 from January 1 to December 31, inclusive, of each year and for domestic
9 purposes from April 1 to October 15, inclusive, of each year.

10 This permit shall be issued subject to the following conditions:

- 11 1. All prior existing water rights in the source of supply.
- 12 2. Any final determination of existing water rights as provided
13 by Montana law.
- 14 3. Subject and junior to all valid prior existing water rights
15 in the source of supply, including but not necessarily limited
16 to the 300 miner's inch water right of the Objector, William
17 J. Kesler, as said right is delineated in the Sistok Proposed
18 Findings of Fact, paragraph 7, and Proposed Conclusions of
19 Law, paragraph 5, cited above.
- 20 4. The Permittee may not appropriate water for either consumptive
21 or nonconsumptive use at such times as to so appropriate would
22 adversely affect any prior existing water right in the source
23 of supply.
- 24 5. The Permittee shall not divert water in any manner from Patrick
25 Creek pursuant to this Provisional Permit at any time when the
26 Objector, William J. Kesler, does not have a full 300 miner's
27 inches available for appropriation at the Objector's point of
28 diversion on Patrick Creek.

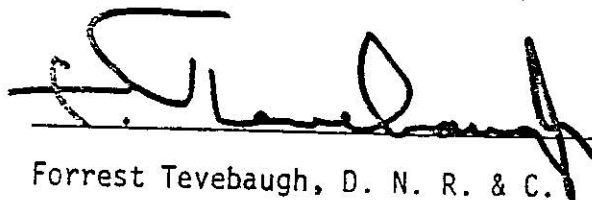
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6. The granting of a Provisional Permit in no way grants the Permittee any right to violate the property or other rights of any other party, nor does it excuse the Permittee from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

7. The granting of a Provisional Permit in no way guarantees that the Permittee will be able to exercise the Provisional Permit.

The Permittee was further informed that an emergency appropriation of water could be made without prior application to the Department should the appropriation be necessary to protect lives or property as a result of fire. The pertinent statute for this kind of appropriation is Section 85-2-113, MCA.

DATED this 2ND day of June, 1979.



Forrest Tevebaugh, D. N. R. & C.

Hearing Examiner